Petition

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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

CIRCLE A & W PRODUCTS COMPANY,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in derogation of the federal policy favoring stable labor relations, the National Labor Relation Board's contract-bar rule should be altered to permit a union to repudiate its representative function and thus cause a change in bargaining representatives, where that incumbent union continues to be able, but is merely unwilling, to adhere to a still effective collective bargaining agreement?

2. Whether, contrary to controlling precedent such as National Labor Relations Board v. Metropolitan Life Insurance Company, 380 U.S. 438 (1965), an order of the National Labor Relations Board should be enforced where that agency has offered no explanation of why it abandoned its own prior policies in making that order?

PARTIES BELOW

The petitioner is Circle A & W Products Company, a wholly-owned subsidiary of Siemens-Allis, a corporation organized and existing under the laws of the State of Delaware. The respondent is the National Labor Relations Board.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	11
I. THE WRIT SHOULD BE GRANTED TO CONSIDER A DECISION BELOW WHICH APPROVES ALTERATION OF THE NLRB'S SALUTARY CONTRACT-BAR RULE IN DEROGATION OF THE FEDERAL POLICY FAVORING INDUSTRIAL STABILITY	11
A. In Order To Further The National Policy Of Promoting Industrial Stability, An Existing Collective Bargaining Agreement Will Bar An Election Petition Unless The Union Is Defunct Or Torn By Intra-Union Schism	13
B. The Decision Of The Court Of Appeals Eviscerates The Contract-Bar Rule And Thereby Undermines Industrial Stability	18

Page

II. CERTIORARI SHOULD BE GRANTED BECAUSE, CONTRARY TO DECISIONS OF THIS COURT, THE BOARD FAILED TO PROVIDE ANY REASONS FOR FAILING TO FOLLOW ITS ESTABLISHED CONTRACT-BAR RULE IN THIS CASE 26

A. It Has Long Been The Court's Rule That Administrative Agencies Such As The Board Must Announce The Reasons For Their Decisions 27

B. The Board Refused Every Opportunity Given It By Circle A & W To Explain Why It Failed To Follow Its Own Precedents Here ... 31

CONCLUSION 37

TABLE OF AUTHORITIES

CASES	Page
Aircraft Turbine Service, Inc., 173 NLRB 709 (1968)	19
Allied Container Corporation, 98 NLRB 580 (1952)	17
American Sunroof Corporation - West Coast, Inc., 243 NLRB No. 172 (1979)	20
Bennett Shoe Company, 139 NLRB 1422 (1962)	16
Bob's Big Boy Family Restaurant v. N.L.R.B., 625 F.2d 850 (9th Cir. 1980)	30, 36
Circle A & W Products Company v. N.L.R.B., 647 F.2d 924 (9th Cir. 1981)	2, 10 11, 12 15, 31
East Manufacturing Corporation, 242 NLRB No. 5 (1979)	18, 19 20, 21 35
Hershey Chocolate Corporation, 121 NLRB 901 (1958)	18, 19
Local 57, Garment Workers v. N.L.R.B., 374 F.2d 295 (D.C. Cir. 1967)	22

Page

Local 1545, United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. Vincent, 286 F.2d 127 (2nd Cir. 1960) 15

Ludlow Typograph Company, 113 NLRB 724 (1955) 22

Mack Trucks, Inc., 209 NLRB 1003 (1974) 19

Manitowoc Shipbuilding, Inc., 191 NLRB 786 (1974) 20, 21

National By-Products Co., 122 NLRB 334 (1958) 20, 21

National Labor Relations Board v. Metropolitan Life Insurance Company, 380 U.S. 438, 85 S.Ct. 1061, 13 L.Ed. 2d 951 (1965) .... i, 29 30, 31 35, 36

N.L.R.B. v. Armcor Industries, Inc., 535 F.2d 239 (3rd Cir. 1976) 28

N.L.R.B. v. Haberman Construction Company, 641 F.2d 351 (5th Cir. 1981) 33

N.L.R.B. v. Osborne Transportation, Inc., 589 F.2d 1275 (5th Cir. 1979) 36

N.L.R.B. v. St. Francis College, 562 F.2d 246 (3rd Cir. 1977) 36

National Sugar Refinery Company, 10 NLRB 1410 (1939) 14

Page

News - Press Publishing Co., 145 NLRB 803 (1964) 19

Oregon Macaroni Company, 124 NLRB 1001 (1959) 16

Plough, Inc., 203 NLRB 121 (1973) 20, 21

St. Louis Bakery Employers, 121 NLRB 1548 (1958) 16

Securities and Exchange Commission v. Chenery Corporation, 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1942) 27, 28 29, 30 35, 36

Superior Electrical Products, 6 NLRB 19 (1938) 13, 14

WTOP, Inc., 114 NLRB 1236 (1955) .. 21

STATUTES

28 U.S.C. §1254(1) 3

Labor-Management Relations Act, 29 U.S.C. §158(a)(1) 3

§158(a)(5) 3

OTHER AUTHORITIES

H. Friendly, "Some Kind of Justice," 123 U. Pa. L. Rev., 1267 (1975) 28

Page

R. A. Gorman, Labor Law, (1st ed. 1976) 16

H.R. Rep. No. 510, 80th Cong., 1st Sess. (1947) 15

C. Morris, The Developing Labor Law, (1st ed. 1970) 13, 16

S.R. Rep. No. 105, 80th Cong., 1st Sess. (1947) 14

Seventh Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1942 (1943) 14

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

Circle A & W Products Company,
Petitioner,

v.

National Labor Relations Board,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Circle A & W Products Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on June 8, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 647 F.2d 924 (9th Cir. 1980) and is reprinted as Appendix "F," infra. That Court's order denying petitioner's Petition for Rehearing In Banc was filed on August 18, 1981, is unreported and appears as Appendix "H," infra. That Court's further order of September 1, 1981, granting petitioner's Motion For Stay of Mandate Pending Application for Certiorari is unreported and appears as Appendix "I," infra.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was filed on June 8, 1981. A timely petition for rehearing in banc was denied on August 18, 1981, and this petition has been filed within ninety

days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

Sections 8(a)(1) and (5) of the Labor Management Relations Act of 1947, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151 et seq provide as follows:

Sec. 8(a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT OF THE CASE

This case arises out of Circle A & W's "technical" refusal to bargain with Local 206 of the International Brotherhood of

Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter, "Local 206") in order to resolve the question of whether, contrary to precedent, a union's willful and unilateral disclaimer of a collective bargaining agreement should serve as an exception to the Board's long-standing contract-bar rule.

Circle A & W manufactures and distributes electrical equipment at its facility in Portland, Oregon. Beginning in 1962, the company entered into a series of collective bargaining agreements with International Brotherhood of Electrical Workers, Local 49 (hereinafter, "Local 49"), each covering a broad unit of employees. The most recent such agreement, and the one relevant here, was for the period January 1, 1977, to January 1, 1980. It included a provision, commonly referred to as a "union security clause," requiring membership in Local 49 as a

condition of employment in the unit.

On February 15, 1977, one of Circle A & W's employees filed a petition with the NLRB seeking an election to withdraw the authority of Local 49 to require membership in the union as a condition of employment. On March 30, 1977, a majority of those voting in a Board conducted election favored revocation of that authority.

After this election, Local 49, as required by law, continued to service its contract with Circle A & W, to collect dues, and to process grievances. With the arrival of a new business agent for Local 49, the Union began a campaign to reinstate the union security clause in the agreement. Circle A & W advised Local 49 that it was neutral on the subject and that it had no objection to a union security clause if the employees wanted the provision. The Company and Local 49 then agreed that a second election should be conducted by the

State of Oregon to determine whether the unit employees wished to revive the union security clause. In that election, the employees again voted against the inclusion of such a clause in the contract.

One week later, Local 49 wrote to the Company and disclaimed representation of the unit employees. Local 49 based this disclaimer on its assertion that the rejection by Circle A & W's employees of a single term of the contract - the union security clause - justified the union in no longer representing the unit. The company immediately responded that it would not give effect to Local 49's effort to walk away from the contract to which both parties had agreed.

Soon thereafter, on April 27, 1978, Local 206 filed a petition with the Board seeking to represent a unit identical to that covered by Local 49's collective

bargaining agreement with Circle A & W.[1/] Although the Company advised the Board that its collective bargaining agreement with Local 49 was still in effect, the Board's Regional Director deliberately chose not to serve Local 49 with notice of the NLRB hearing on the Local 206 petition.

At that hearing, the Company maintained that under the Board's contract-bar rule, the still current contract with Local 49 barred the Local 206 petition. Despite this objection, the Regional Director issued a Decision and Direction

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[1/] On May 10, 1978, the Company filed an unfair labor practice charge against Local 49, alleging that Local 49 had restrained and coerced Circle A & W employees in the exercise of their section 7 rights and that Local 49 failed and refused to bargain collectively with Circle A & W.

Only two days later, and before the Company was permitted to submit any evidence in support of its charge, the Board announced that the charge had been "carefully investigated and considered" and that further proceedings were not warranted.

of Election. (App. "A".) This order provided for a representation election in a unit identical to that covered by the Circle A & W - Local 49 contract. The Board summarily denied Circle A & W's request that it review this order. (App. "B".)

An election was held on August 4, 1978, and a majority of the unit employees voted for representation by Local 206. The Company filed timely objections to the conduct of the election, contending, inter alia, that the Board had conducted an invalid election and that the Board conducted an election without notifying all parties and/or allowing all parties to appear on the ballot. The objections were overruled, and Local 206 was certified as the exclusive bargaining representative of the Circle A & W employees. (App. "C".) A Request for Review of the Supplemental Decision and Certification of Repre-

sentative was timely filed by the company and was summarily denied by the Board. (App. "D".)

The Company then refused to bargain with Local 206 and, on December 14, 1978, an unfair labor practice charge was filed against the Company, alleging a violation of the duty to bargain in good faith. After the Board's Regional Director issued a complaint on the basis of that charge and the Company answered, the General Counsel made a motion for summary judgment. The Board granted this motion. (App. "E".) The Board ordered the company to bargain with Local 206 and subsequently filed an application for the enforcement of its order with the Court of Appeals for the Ninth Circuit.

Only once in its processing of this case did the Board or its agents offer any discussion of their failure to find Circle A & W's contract with Local 49 a bar to

Local 206's petition to represent the unit covered by that contract. The whole of this discussion is found in a footnote to the Regional Director's Direction of Election, where he notes briefly and then summarily rejects the company's position that Local 206's petition was barred by the Local 49 contract. Subsequent Board rulings merely assert that all issues raised by Circle A & W were or could have been raised at the time the election was directed.

A divided panel of the Court of Appeals granted enforcement of the Board's order. The majority opinion acknowledges that, "[T]here is logic to [Circle A & W's] position" that an existing contract will bar the selection of a new bargaining representative only where the incumbent union's continued representation is wholly impracticable, as where there is a union schism or where the union is defunct. 647

F.2d 924, 925 (9th Cir. 1981). Judge Pregerson's dissenting opinion goes further and observes that in light of the majority's decision, ". . . the current effectiveness of the contract-bar rule is questionable." 647 F.2d at 927.

Circle A & W petitioned the Court of Appeals for rehearing in banc. Its petition was denied on August 18, 1981. (App. "H".) On September 1, 1981, the Court of Appeals granted the Company's Motion For a Stay of Mandate Pending Application for Certiorari. (App. "I".)

REASONS FOR GRANTING THE WRIT

I

THE WRIT SHOULD BE GRANTED TO CONSIDER A DECISION BELOW WHICH APPROVES ALTERATION OF THE NLRB'S SALUTARY CONTRACT-BAR RULE IN DEROGATION OF THE FEDERAL POLICY FAVORING INDUSTRIAL STABILITY.

This case presents the significant

question of the continuing vitality of the National Labor Relations Board's salutary contract-bar rule, a rule which is the embodiment of the national policy favoring stability in industrial relations. The specific question before the Court is whether that rule should continue to be applied so as to bar a representation election where an incumbent union is unwilling, although able, to represent employees on whose behalf it has entered into a current collective bargaining agreement. If an existing contract does not bar an election under these circumstances, the continuing effectiveness of the contract-bar rule is, as the dissenting opinion below says, "questionable." 647 F.2d 924, 927 (9th Cir. 1981). The writ should be granted, therefore, in order to resolve this fundamental issue of labor relations law, a question which goes beyond the

petitioner's interests and potentially affects the operation of all current and future collective bargaining agreements.

A. In Order To Further The National Policy Of Promoting Industrial Stability, An Existing Collective Bargaining Agreement Will Bar An Election Petition Unless The Union Is Defunct Or Torn By Intra-Union Schism.

Simply stated, the contract-bar rule provides that an existing collective bargaining agreement for a term not exceeding three years will bar a petition for an election during its term. See, generally, C. Morris, The Developing Labor Law, 167 (1st Ed. 1970). This rule was established early in the history of the National Labor Relations Board and has been a mainstay of labor relations law for over four decades.

The rule emerged in 1938 in Superior Electrical Products, 6 NLRB 19, 22 (1938), where the Board held that a contract would bar "an investigation of representatives until such time as the contract is about to

expire and a question then exists as to the proper representation for collective bargaining with respect to the negotiations [sic] of a new agreement." See also, National Sugar Refinery Company, 10 NLRB 1410, 1415 (1939). By 1942, the rule was relied upon as an accepted tenet of labor relations law and was described as follows in the Board's Seventh Annual Report:

> "The Board has normally refused to proceed to an election, in the presence of a collective bargaining contract, where the contract grants exclusive recognition, is to be effective only for a reasonable period . . . and was negotiated by a union representing at the time a majority of the employees, prior to any claim by a rival labor organization." Seventh Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1942 (1943) at p. 55.

Soon after, in 1947, Congress took note of the contract-bar rule in amending the National Labor Relations Act. See, S. Rep. No. 105, 80th Cong., 1st Sess. 25

(1947); The Conference Report, H.R. Rep. No. 510, 80th Cong., 1st Sess. 50 (1947). See also, Local 1545, United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. Vincent, 286 F.2d 127, 130-31 (2nd Cir. 1960).

The purpose of the rule - to stabilize the employer-union relationship - has been consistently clear. As recognized in the majority opinion below,

> "The Board's contract-bar rule is designed in recognition of the importance of preserving stability in collective bargaining agreements. . . .
>
> "The policy of preserving industrial stability is of sufficient importance that the Board is required to implement the contract bar rule to protect the employer's rights as well as those of the employees." 647 F.2d 924, 926 (9th Cir. 1981).

The Board has developed two major exceptions to the rule. An existing contract will not bar an election where the union has become "defunct" or where there

is an intra-union conflict constituting a "schism."[2/] C. Morris, The Developing Labor Law, 167-176 (1st Ed. 1970). A schism exists where there is an intra-union conflict of such magnitude that the bargaining representative is fractured and ineffective. See, e.g., Oregon Macaroni Company, 124 NLRB 1001, 1004, (1959); St. Louis Bakery Employers, 121 NLRB 1548, 1551 (1958). Similarly, a union is deemed defunct where it is simply unable to continue to represent the employees. See, e.g., Bennett Shoe Company, 139 NLRB 1422, 1423 (1962). In cases involving a union which is defunct or torn by schism, the

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[2/] There are additional exceptions to the contract-bar rule which are not material here. For example, under certain circumstances, a contract with no fixed duration, a contract containing unlawful provisions, or a contract deemed "skeletal" will not bar an election. For a thorough discussion of these exceptions to the contract-bar rule, see, R. A. Gorman, Labor Law, 54-59 (1st Ed. 1976).

contract-bar rule and the accompanying policy of preserving industrial stability are suspended because the identity of the bargaining representative is destroyed and continued representation of employees by the incumbent union is impossible.

The Board has held that exceptions to the contract-bar rule must be created with care and not established at the expense of the rule and the underlying policy favoring industrial stability:

> "The rule represents a compromise between the desirability of permitting employees to change their bargaining representatives at will and the stability which is necessary for the effective conduct of labor relations.
>
> But if the rule is to serve its purpose, care must be taken that in providing for necessary exceptions, the rule itself is not left an empty sieve." Allied Container Corporation, 98 NLRB 580, 581 (1952).

In this case, without explanation, the Board has established a new and unwise

exception to the contract-bar rule, one created wholly at the expense of the policy of preserving industrial stability and so broad as to render the rule itself "an empty sieve."

B. The Decision Of The Court Of Appeals Eviscerates The Contract-Bar Rule And Thereby Undermines Industrial Stability.

As seen above, Local 49 repudiated its representation of Circle A & W's employees and walked away from its contract solely because members of the unit disapproved one term of that contract. Such unwillingness to continue representing employees has not been a recognized exception to the contract-bar rule, nor should it be established as one now.[3/] See, East Manufacturing Corp., 242

[3/] The Board argued to the Court of Appeals that dictum in Hershey Chocolate Corporation, 121 NLRB 901, 911 (1958), established that a union's unwillingness to represent the employees was an

[FOOTNOTE CONTINUED ON FOLLOWING PAGE]

NLRB 5 (1979); Mack Trucks Inc., 209 NLRB 1003 (1974); Aircraft Turbine Service, Inc., 173 NLRB 709 (1968); News-Press Publishing Co., 145 NLRB 803 (1964). The Board itself recently recognized as much:

> "Each party has substantial investments in the bargaining process and their investments deserve, where practicable, both deference and protection. Simply, to permit an incumbent and vital labor organization to disavow its lawful contractual obligations when it is not defunct derogates our contract-bar doctrine. East Manufacturing Corporation, 242 NLRB 5, 6 (1979).4/

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

exception to the contract-bar rule. The union in Hershey was unwilling to represent the employees because it was defunct. Mere unwillingness to continue to represent employees, without more, has not previously been found to be the equivalent of defunctness or recognized as an exception to the contract-bar rule. See, e.g., East Manufacturing Corp., 242 NLRB 5 (1979); Mack Trucks Inc., 209 NLRB 1003 (1974); Aircraft Turbine Service, Inc., 173 NLRB 709 (1968); News-Press Publishing Co., 145 NLRB 803 (1964).

4/ The Board has rarely departed from

[FOOTNOTE CONTINUED ON FOLLOWING PAGE]

Where the incumbent is defunct or torn by an intra-union schism, the

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the reasoned explication of this principle enunciated in East Manufacturing Corporation, supra. However, in American Sunroof Corporation - West Coast Inc., 243 N.L.R.B. 1128 (1979), the Board permitted a union to disclaim its representational interest without showing that it was defunct or suffering a schism. Petitioner has maintained thoroughout these proceedings that American Sunroof, decided after all Board processing of this case concluded, was wrongly reasoned and inconsistent with Board precedent. The majority opinion below agreed, observing that there "is a logic to [the employer's] position," 647 F.2d 924, 925 (9th Cir. 1981), and that American Sunroof did not square with previous Board decisions. The Court went on to say that the Board in American Sunroof rejected the contract-bar defense ". . . without explicitly recognizing the important policy to protect the employer by preserving the stability of a collective bargaining agreement," and characterized the American Sunroof decision itself as, "opaque." Id.

In the Court of Appeals, the Board relied on the obscure cases of National By-Products Co., 122 NLRB 334 (1958); Manitowoc Shipbuilding Inc., 191 NLRB 786 (1971); and Plough Inc., 203 NLRB 121

[FOOTNOTE CONTINUED ON FOLLOWING PAGE]

contract and the industrial stability it embodies cannot be preserved because the bargaining representative is unable to discharge its contractual obligations. In this case, however, the policy of promoting industrial stability was ignored only because the incumbent union was unwilling to continue its contractual duties. Here, the Company will be forced to begin a new round of negotiations with a

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(1973) as authority for the proposition that a union may disclaim its representational interest. These cases predate and are contrary to East Manufacturing. In unreasoned opinions, each of these cases relied on its predecessor, viz., Plough relied upon Manitowoc and National By-Products, Manitowoc relied upon National By-Products, and National By-Products relied upon WTOP Inc., 114 NLRB 1236 (1955) for the rather broad proposition that a union may disclaim its representational interest. Significantly, the Board failed to mention that in the decision which is at the heart of all of these cases, WTOP Inc., there was a specific finding that the union was defunct. 114 NLRB at 1237.

second union because the former one willfully chose to abandon the unit it had represented and the contract which it had negotiated.

To force this or any other employer to bargain with a new union simply because an incumbent no longer chooses to represent employees in a unit not only undermines rather than promotes industrial stability, it is also prejudicial to the employer and inconsistent with the employer's obligations in a like situation. In contrast to the option the Board has here opened to unions, an employer unhappy with one or more terms of a contract cannot repudiate an existing bargaining relationship merely because of its dissatisfaction. See, e.g., Local 57, Garment Workers v. N.L.R.B., 374 F.2d 295 (D.C. Cir. 1967). Moreover, an employer faced with a union abandonment of that relationship is

prejudiced because the stability of the carefully nurtured collective bargaining relationship is upset and it is forced to expend the time and energy to negotiate anew regarding the basic terms and conditions of employment. See, e.g., Ludlow Typograph Co., 113 NLRB 724 (1955).

This case is an arresting illustration of these principles; forcing Circle A & W to bargain with a new union is not only prejudicial to the company, but also undermines rather than promotes industrial stability. Circle A & W had recently completed the process of negotiating a collective bargaining agreement with Local 49, an agreement it had every reason to believe established a stable relationship. Soon thereafter, however, Local 49 did something Circle A & W could not willfully do - it repudiated both the contract and the bargaining relationship. It did so only because Circle A & W's

employees voted against allowing it to require union membership as a condition of employment. There is no question but that Local 49 was fully able to continue representing the unit. It had previously administered the contract without the inclusion of a union security clause. Indeed, it did so for some months after the removal of that clause from the contract.

Under applicable precedent, the Board should have found on these facts that Circle A & W's contract with Local 49, a vital union suffering from neither schism nor defunctness, barred Local 206's petition. The Board, however, inexplicably failed to apply its contract-bar rule here. The results of this decision and its affirmance by the Court of Appeals are that the process of bargaining with a second union must begin and that the continued vitality of the national policy favoring stable industrial relations is

thereby impaired.

The contract-bar doctrine has for decades provided stability in labor-management relations by assuring that, unless a union is unable to fulfill its contractual obligations, the difficult process of negotiating a collective bargaining agreement results in a bar to a repetition of that process for the agreement's term. The decision below permits present and future collective bargaining agreements to be cancelled at the option of incumbent unions. A change this sweeping in one of the nation's fundamental labor relations policies should not be effected without review by this Court; the writ of certiorari should be granted.

II

CERTIORARI SHOULD BE GRANTED BECAUSE, CONTRARY TO DECISIONS OF THIS COURT, THE BOARD FAILED TO PROVIDE ANY REASONS FOR FAILING TO FOLLOW ITS ESTABLISHED CONTRACT-BAR RULE IN THIS CASE.

Not only did the NLRB depart dramatically from its long-established contract-bar rule when it directed an election on the basis of Local 206's petition, in doing so it offered nothing which can be fairly characterized as an explanation for this failure to follow its own precedents. The Board here refused to use the several opportunities to explain itself given it by Circle A & W's objections to its course of conduct. This failure to explain its abandonment of precedent places the Board's order and the decision of the Court of Appeals in direct conflict with controlling decisions of this Court.

A. It Has Long Been The Court's Rule That Administrative Agencies Such As The Board Must Announce The Reasons For Their Decisions.

Early in its experience with the regulatory agencies spawned by the New Deal, this Court recognized that such agencies must articulate the reasons for their rulings if the judiciary is to be able to exercise its statutory role of reviewing those decisions. Thus, in Securities And Exchange Commission v. Chenery Corporation, 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1942), Justice Frankfurter, speaking for the Court in setting aside an order of the Commission, said,

> "[T]he courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review . . . [T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately

sustained." 318 U.S. at 94, 63 S.Ct. at 462, 87 L.Ed. at 636.

The requirement that an agency offer the reasons for its decisions also serves as a prophylaxis against abuse of discretion. As Judge Friendly of the Second Circuit has observed,

> "A written statement of reasons, almost essential if there is to be judicial review, is desirable on many other grounds. The necessity for justification is a powerful preventative of wrong decisions." H. Friendly, "Some Kind of Justice," 123 U. Pa. L. Rev. 1267, 1292 (1975).5/

This Court has applied these general propositions specifically to the actions

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5/ The Court of Appeals for the Third Circuit expressed a similar and relevant thought when it observed that requiring the Board to explain the reasons for its orders contributes to growth and predictability in labor law. N.L.R.B. v. Armcor Industries, Inc., 535 F.2d 239, 245 (3rd Cir. 1976). This observation is especially salient: As already seen, the contract-bar rule which the Board inexplicably failed to follow here was developed to promote stability and predictability in the relations between employers and the unions representing their employees.

of the National Labor Relations Board. In National Labor Relations Board v. Metropolitan Life Insurance Company, 380 U.S. 438, 85 S.Ct. 1061, 13 L.Ed. 2d 951 (1965), the Court refused to enforce an order of the Board due to the Board's failure to provide "articulated reasons" for its decision. 380 U.S. at 442, 85 S.Ct. at 1064, 13 L.Ed. 2d at 954-955. In so doing, the Court followed the concept enunciated by Justice Frankfurter in the Chenery case, supra, that, "The [agency's] action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as . . . appropriate . . . There must be such a responsible finding." Securities And Exchange Commission v. Chenery Corporation, supra, 318 U.S. at 94, 67 S.Ct. at 462, 87 L.Ed. at 636. [Emphasis supplied.]

The holdings in Chenery and

Metropolitan Life, supra, were applied in the contract-bar setting by the Ninth Circuit less than a year before that court decided this case. The Court of Appeals then said, "Although the Board has considerable discretion in the formulation and application of its contract-bar rule, it must explain departures from that rule." Bob's Big Boy Family Restaurant v. N.L.R.B., 625 F.2d 850, 853-854 (9th Cir. 1980). The majority of the panel which decided this case below made no effort to reconcile its decision with the holding of Bob's Big Boy, let alone with the Chenery and Metropolitan Life decisions on which that holding is bottomed.

The Metropolitan Life Court also set forth a logical corollary to the requirement that the Board explain the reasons for its decision. The Court said that it would be "incompatible with the orderly functioning of the process of judicial

review" to accept appellate counsel's explanations for the Board's actions where it had failed to explain those actions itself. N.L.R.B. v. Metropolitan Life Insurance Company, supra, 380 U.S. at 444, 85 S.Ct. at 1064, 13 L.Ed. 2d at 955.

Such a post hoc explanation for its acts is all that the Board can muster here. As the dissent below points out, "[T]he Board did not explain its decision to suspend the contract-bar rule" in this case. 647 F.2d 924, 927 (9th Cir. 1981). This failure, indeed refusal, to explain itself is a strand which has run through all of the Board's processing of this matter.

B. The Board Refused Every Opportunity Given It By Circle A & W To Explain Why It Failed To Follow Its Own Precedents Here.

By its continued and repeated objections to the selection and certification of a new union to represent its

employees while there was still in effect a contract with a union able to represent those same employees, Circle A & W provided the Board with three opportunities to articulate reasons for its decision to abandon the contract-bar rule in this case. The first such opportunity occurred when the Company sought review of the Regional Director's Decision and Direction of Election. The Board summarily refused to review that order.

The order the Board declined to review, and so never considered, contains the only discussion of the abrogation of the contract-bar rule offered by the Board or any representative of it prior to the filing of briefs in the Court of Appeals. This discussion, authored not by the Board but by its Regional Director in Seattle, Washington, is a two-paragraph footnote attached to a NLRB form. That footnote does little more than recite the Company's

position before perfunctorily rejecting it. (See, Appendix "B".) This cursory discussion by its regional representative is scarcely the clear statement by the Board itself of, "the intent of its decisions and . . . the basis of departures from its own precedents" required here. N.L.R.B. v. Haberman Construction Company, 641 F.2d 351, 363 (5th Cir. 1981) (en banc).

The Board's second opportunity to explain its failure to follow the contract-bar rule in this case was presented when Circle A & W appealed the Regional Director's rejection of its objections to the election which resulted in Local 206's certification. Although one of those objections was that the election should not have been held because of the existence of Circle A & W's contract with Local 49, the Board, without explanation, refused the request for review.

Circle A & W presented the Board with a final opportunity to explain itself during the unfair labor practice proceeding which has brought this case before the Court. There, the company alleged as an affirmative defense to the allegation that it had unlawfully refused to bargain with Local 206 that Local 206's certification was improper because the contract between Circle A & W and Local 49 was current at the time of the representation election which resulted in Local 206's certification. The Board again declined to deal with the merits of the company's position, asserting without further explanation that all the issues the Company raised were or could have been litigated in the underlying representation case. (See, Appendix "E".)

Thus, the Board had and rejected three separate opportunities to provide a statement of the reasons for its refusal to

apply the contract-bar rule to this case or to describe how the reasoning of East Manufacturing, supra, is not controlling here. In sum, the Board has created a record which contains no statement by it of the reasons for its decision and one which suggests nothing so much as unthinking adherence to an erroneous decision made at the initial administrative level.

This absence of explanation, taken together with the fact that the Board's decision leaves "the current effectiveness of the contract-bar rule . . . questionable," 647 F.2d 924, 927 (9th Cir. 1981), makes this case appropriate for certiorari: The Board has acted here in disregard of the holdings in Chenery Corporation and Metropolitan Life Insurance Company, discussed above. Those cases may be summarized as requiring that, "[i]n exercising the discretion entrusted it in representation matters, the Board

must faithfully adhere to the policies and procedures previously announced in its rules and decisions" until it announces a change and the reasons therefor. N.L.R.B v. Osborn Transportation, Inc., 589 F.2d 1275, 1279 (5th Cir. 1979). See, N.L.R.B. v. St. Francis College, 562 F.2d 246, 252 (3rd Cir. 1977).

There can really be no fair argument that the Board has met this requirement, or the more specifically applicable formulation of it contained in Bob's Big Boy, supra. Those Court of Appeals holdings are, of course, no more than specific applications of the rules developed by this Court in Chenery Corporation and Metropolitan Life, supra. Accordingly, the decision below conflicts directly with decisions of this Court in such a way as to make it both appropriate and necessary that certiorari be granted.

CONCLUSION

For the reasons set forth above, the writ of certiorari should be granted.

Dated: September 21, 1981

Respectfully submitted,

GERALD R. LUCEY
JERROLD C. SCHAEFER*
KENT JONAS
NANCY EBE
CORBETT, KANE & BERK
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APPENDICES

TABLE OF CONTENTS

	Appendix
N.L.R.B. Order Directing Election (6/5/78)	A
N.L.R.B. Order Denying Circle A & W's Application For Review (7/13/78)	B
N.L.R.B. Supplemental Decision and Certification of Representative (9/6/78)	C
N.L.R.B. Order Denying Employer's Objections to Election (10/24/78)	D
Decision & Order Granting Motion for Summary Judgment (7/12/79), 243 NLRB 80	E
Opinion of the Court of Appeals (6/8/81)	F
Judgment of the Court of Appeals	G
Order Denying Petition for Rehearing (8/18/81)	H
Order on Motion for Stay of Mandate (9/1/81)	I

APPENDIX A

APPENDIX A

PORTLAND

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CIRCLE A & W PRODUCTS COMPANY

Employer

and Case No. 36-RC-4046

WAREHOUSEMEN'S UNION LOCAL NO. 206, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated

its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[1/] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section

////

1/ A brief filed by the Employer has been duly considered.

2(6) and (7) of the Act.[2/]

[2/] The Employer relies on the contract bar doctrine in support of its motion to dismiss this petition. On April 14, 1977 the Employer and the International Brotherhood of Electrical Workers, Local Union No. 49 (hereinafter called IBEW Local 49) executed a collective bargaining agreement, effective January 1, 1977 through December 31, 1979, covering the unit involved herein. On April 12, 1978 IBEW Local 49 informed the Employer in writing that it disclaimed any interest in representing the unit and refused to enforce the terms of the contract.

Board precedent clearly establishes that for a contract to operate as a bar to a representation petition, the union signatory must demonstrate a present willingness and ability to represent employees and administer the terms of the contract. J. P. Sand and Gravel Company, 222 NLRB 83 (1976); Hershey Chocolate Corporation, 121 NLRB 901 (1958). Further, the Board has consistently found that a written disclaimer of interest such as the one herein constitutes sufficient evidence of a union's unwillingness to police the contract. Plough, Inc., 203 NLRB 121 (1973); Manitowoc Shipbuilding, Inc. and The Manitowoc Company, Inc., 191 NLRB 786 (1971); National By-Products Company, 122 NLRB 334 (1958). Accordingly, I conclude that IBEW Local 49 effectively removed its contract with the Employer as a bar to the present representation petition by its disclaimer of interest. For this reason, the Employer's motion to dismiss the petition is denied.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[3/]

> All employees employed by Circle A & W Products Company at its Portland, Oregon facility, but excluding office clerical employees, salespersons, professional employees, independent contractors, guards and supervisors as defined in the National Labor Relations Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the

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3/ The Employer is a state of California corporation engaged in the manufacture and distribution of electrical metal enclosures and electrical distribution equipment at its 13885 Southwest 72nd Avenue, Portland, Oregon facility.

The parties stipulated to the composition of the unit, and I accept this stipulation. The unit is identical to that formerly represented by IBEW Local 49.

There are approximately 72 employees in the unit.

employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause

since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Warehousemen's Union Local No. 206, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S.

759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the Officer-in-Charge, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Subregional Office, 310 Six Ten Broadway Building, 610 Southwest Broadway, Portland, Oregon 97205 on or before June 12, 1978. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section

102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennysylvania Avenue, NW., Washington, D.C. 20570. This request must be received by the Board in Washington by June 19, 1978.

Dated June 5, 1978 at Seattle, Washington

(SEAL)

CHARLES M. HENDERSON
Regional Director, Region 19

APPENDIX B

APPENDIX B

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RUWLRAO.

NLRB

FM MARIO A LAURO JR ASSOC EXEC SECY NLRB WASHDC

TO RUWLRAO/2/PAUL C HAYS ESQ CARNEY HALEY PROBST & LEVAK 41Ø RIVIERA PLAZA 1618 SW FIRST ST PORTLAND OR 972Ø1

TO RUWLRAO/2/NLRB PORTLAND OR

BT

RE: CIRCLE A & W PRODUCTS CO, 36-RC-4Ø46. EMPLOYER'S REQUEST FOR REVIEW OF REGNL DIRECTOR'S DECISION AND DIRECTION OF ELECTION IS HEREBY DENIED AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVIEW. BY DIRECTION OF THE BOARD:

BT [Teletype Message

NNNN Telephoned 7/13/78]

[63127 WLRAO

APPENDIX C

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

CIRCLE A & W
PRODUCTS COMPANY

Employer

and Case No. 36-RC-4046

WAREHOUSEMEN'S
UNION LOCAL NO.
06, INTERNATIONAL
BROTHERHOOD OF
TEAMSTERS,
CHAUFFEURS,
WAREHOUSEMEN AND
HELPERS OF
AMERICA

Petitioner

SUPPLEMENTAL DECISION
AND
CERTIFICATION OF REPRESENTATIVE

Pursuant to a Decision and Direction of Election issued by the Regional Director on June 5, 1978, an election was conducted by the Regional Director on August 4, 1978, in an appropriate bargaining unit. An official tally of ballots

was served upon the parties following the count, setting forth the following results:

Approximate number of eligible voters	69
Void ballots	0
Votes cast for the Petitioner	43
Votes cast against participating labor organization	18
Valid votes counted	61
Challenged ballots	0
Valid votes counted plus challenged ballots	61

On August 11, 1978, the Employer filed timely Objections to the Conduct of the Election and Conduct Affecting the results of the Election, a copy of which was duly served on the Petitioner.

Acting pursuant to Section 102.69 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, an

investigation has been conducted with respect to the Employer's objections. Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers herein to the Acting Regional Director:

Upon the entire record herein, the Acting Regional Director finds:

The Employer's objections are the following:

1. The Board conducted an invalid election.

2. The Board conducted an election without notifying all parties and/or allowing all parties to appear on the ballot.

3. The Teamsters, by its agents, made unlawful promises of benefits to those eligible voters to vote for the Union, and made promises of benefits to all eligible employees as an inducement to vote for the Union. Such unlawful promises were made at a time which precluded the Employer from responding.

4. The above-named Union, by its agents, interfered with the

rights of the employees by singling out known non-union adherents and publicly insulting them and inciting them.

5. The above-named Union, by its agents, interfered with, restrained, and/or coerced the employees in the exercise of their rights guaranteed by Section 7 of the Act.

6. The Union threatened known non-union adherents because of their opinions and activities against a Union vote.

7. The Sub-regional Office of the Board held the balloting in a site and in a manner which caused confusion and/or which created an atmosphere of Teamster domination of the election procedures and intimidation of eligible voters so as to destroy the "laboratory" conditions required for the conduct of elections.

By letter dated August 22, 1978, Objections 3 and 7 were withdrawn. In this same letter counsel for the Employer advised that evidence in support of Objections 4, 5 and 6 would be forthcoming. On August 31, 1978, counsel for the Employer advised that no evidence in

support of the objections could be supplied. The Employer had been advised on August 11, 1978, to supply evidence in support of its objections. The Employer relies on its Request for Review, which was denied by the Board, in support of Objections 1 and 2. Objections 1 and 2 go to the Regional Director's failure to find a contract bar in his Decision and Direction of Election and the failure to include a labor organization which had disclaimed interest in representing the employees of the Employer on the ballot.

Since no evidence was supplied to Objections 4, 5 and 6, they are overruled. Inasmuch as I have previously decided the issues raised by Objections 1 and 2, they are overruled. I am approving the withdrawal of Objections 3 and 7 since there is no independent evidence to support them.

Conclusion as to Objections

The Employer's objections having been

overruled, and the Petitioner having received a majority of the votes cast, it follows that a Certification of Representative should issue.[1/]

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that Warehousemen's Union Local No. 206, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, has been designated and selected by a majority of the employees of the above-named Employer, in the unit described below, as their representative for the purposes of collective bargaining, and that, pursuant to Section 9(a) of the Act as amended, the said labor organization is

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[1/] Pursuant to Section 102.69(g) affidavits and other documents which a party has submitted timely to the Regional Director in support of objections are not a part of the record unless included in the Regional Director's Decision or appended to the request for review, or opposition thereto, which a party submits to the Board.

the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment 2/

UNIT: All employees employed by Circle A & W Products Company at its Portland, Oregon facility, but excluding office clerical employees, salespersons, professional employees, independent contractors, guards and supervisors as defined in the National Labor Relations Act.

2/ Under the provisions of Section 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the National Labor Relations Board addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by September 19, 1978.

Dated at Seattle, Washington this 6th day of September 1978.

WALTER J. MERCER

Walter J. Mercer
Acting Regional Director
National Labor Relations
Board, Region 19
2948 Federal Building
915 Second Avenue
Seattle, Washington 98174

APPENDIX D

APPENDIX D

[63127 WLRAO

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RAAUIJHZ RUEVDELØØØ7 2981515Ø-UUUU-RUWLRAO.

NLRB

FM MARIO LAURO JR ASSOC EXEC SECY NLRB WSH DC

TO RUWLRAO/2/PAUL HAYS ESQ CARNEY HALEY PROBST AND LEVAK 41Ø RIVIERA PLAZA 1618 SOUTHWEST FIRST ST PORTLAND ORE

TO RUWLRAO/2/NLRB SUBREG 36 PORTLAND ORE

BT

RE CIRCLE A & W PRODUCTS CO. 36 RC 4Ø46 EMPLOYER'S REQUEST FOR REVIEW OF ACTING REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATION IS HEREBY DENIED AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVIEW. BY DIRECTION OF THE BOARD: DATED OCT. 24, 1978.

BT [Teletype Message

NNNN Telephoned 10/25/78]

[63127 WLRAO

APPENDIX E

APPENDIX E

FJP

243 NLRB No. 80 Portland, OR

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CIRCLE A & W PRODUCTS COMPANY

and Case 36-CA-3380

WAREHOUSEMEN'S UNION LOCAL NO. 206, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA

DECISION AND ORDER

Upon a charge filed on December 14, 1978, by Warehousemen's Union Local No. 206, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, herein called the Union, and duly served on Circle A & W Products Company, herein called Respondent, the General Counsel of the

National Labor Relations Board, by the Regional Director for Region 19, issued a complaint[1/] on January 24, 1979, and on

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1/ Answering par. 2 of the complaint, Respondent denies the allegation that it is a California corporation and avers that it was sold in late 1978 and that since then it has operated as a subsidiary of another (unnamed) corporation. Respondent admits, however, the remainder of par. 2. Thereby Respondent admits that it is engaged in the manufacture and distribution of electrical equipment in several States of the United States, including the state of Oregon, and that during the past year it has sold and shipped from its Portland, Oregon facility to points outside the state of Oregon products valued in excess of $50,000. Answering par. 3 of the complaint, Respondent denies the conclusionary allegation that it was engaged in commerce but does so based solely on its answer to par. 2.

In its opposition, Respondent reiterates its assertion that it is "incorrectly identified in the complaint" but fails and declines to furnish any further details or information concerning such asserted misidentification. In any event, we note that Respondent has admitted sufficient evidentiary facts to establish the allegation of par. 3 of

[FOOTNOTE CONTINUED ON FOLLOWING PAGE]

February 5, 1979, issued an Erratum to the complaint against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an administrative law judge and erratum to the complaint, were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 6, 1978,

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

the complaint that it is an employer within the meaning of Sec. 2(2) of the Act engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act, and we so find. We also note that the Board's Order herein shall issue against the named Respondent, including its successors and assigns, if any.

following a Board election in Case 36-RC-4046, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[2/] and that, commencing on or about November 15, 1978, and at all times thereafter, and particularly by letter dated November 15, 1978, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has

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2/ Official notice is taken of the record in the representation proceeding, Case 36-C-4046, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See LTV Electrosystems, Inc., 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); Golden Age Beverage Co., 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); Intertype Co. v. Penello, 269 F.Supp. 573 (D.C.Va., 1967); Follett Corp., 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

requested and is requesting it to do so. On February 26, 1979, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

Respondent asserted four affirmative defenses in its answer in support of its general defense that the certification was invalid: (1) The election was invalid because of the existence of a valid contract bar; (2) Respondent has a valid continuing collective-bargaining agreement with another labor organization; (3) discriminatory alleged withdrawal of representation by another labor organization because Respondent's employees exercised Section 7 rights precludes the possibility of Respondent having violated the Act; (4) Respondent was prejudiced by the Board's refusal to investigate charges filed against the labor organization that formerly represented its employees and by

the dismissal of the charges before Respondent was given an opportunity to present evidence.

On March 8, 1979, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment with appendices attached. The General Counsel maintains that each of Respondent's asserted four affirmative defenses in support of its general defense that the certification was invalid was fully considered by the Regional Director and the Board in Case 36--RC--4046, and that there are no issues of fact or law requiring a hearing in this proceeding. Subsequently, on March 19, 1979, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a memorandum in opposition to the Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its opposition, Respondent concedes that it has refused to bargain with the Union but urges that its refusal is justified as a matter of law. Respondent maintains that the election and certification is invalid because of the presence of a valid contract bar, as alleged in its four affirmative defenses. Accordingly, it is Respondent's view that it is not required to bargain with the certified Union.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a

respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3/]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice

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3/ See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent[4/] is engaged in the manufacture and distribution of electrical equipment in several States of the United States, including the State of Oregon. During the past year Respondent sold and shipped from its Portland, Oregon, facility to points outside the State of Oregon products valued in excess of $50,000.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act,

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4/ As noted in fn. 1 of this Decision.

and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Warehousemen's Union Local No. 206, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees employed by Circle A & W Products Company at its Portland, Oregon, facility, but excluding office clerical employees, sales-persons, professional employees, independent contractors, guards and supervisors as defined in the Act.

2. The certification

On August 4, 1978, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 19, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on September 6, 1978, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about November 2 and 29, 1978, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described

unit. Commencing on or about November 15, 1978, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since November 15, 1978, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described

in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we

shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962); Commerce Company d/b/a Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; Burnett Construction Company, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Circle A & W Products Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Warehousemen's Union Local No. 206, International Brotherhood of

Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by Circle A & W Products Company at its Portland, Oregon, facility, but excluding office clerical employees, salespersons, professional employees, independent contractors, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 6, 1978, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about November

15, 1978, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

////

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Circle A & W Products Company, Portland, Oregon, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Warehousemen's Union Local No. 206, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees employed by Circle A & W Products Company at its Portland, Oregon, facility, but excluding office clerical employees, sales-persons, professional employees, independent contractors, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Portland, Oregon, facility copies of the attached notice marked "Appendix."[5/] Copies of said

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5/ In the event that this Order is

[FOOTNOTE CONTINUED ON FOLLOWING PAGE]

notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps have

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[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

been taken to comply herewith.

Dated, Washington, D.C. July 12, 1979

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Warehousemen's Union Local No. 206, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and

other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All employees employed by Circle A & W Products Company at its Portland, Oregon, facility, but excluding office clerical employees, sales-persons, professional employees, independent contractors, guards and supervisors as defined in the Act.

CIRCLE A & W PRODUCTS COMPANY
(Employer)

Dated _____ _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be

directed to the Board's Office, Federal Building, Room 2948, 915 Second Avenue, Seattle, Washington 98174, Telephone 206--442--7472.

APPENDIX F

APPENDIX F

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

CIRCLE A & W PRODUCTS COMPANY, Respondent.

No. 79-7534

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 9, 1980.

Decided June 8, 1981.

On Application for Enforcement of an Order of The National Labor Relations Board.

Before KENNEDY, PREGERSON and POOLE, Circuit Judges.

KENNEDY, Circuit Judge:

In this case, a union disclaimed representation of a bargaining unit during the existing term of a collective bargaining agreement with the employer. While the collective bargaining agreement

with the first union was still extant, the employees selected a new union as their collective bargaining agent in an election supervised by the National Labor Relations Board (Board). The employer refused to bargain with the new union, claiming a right to stand upon the existing collective bargaining agreement until it expired. The employer's position was based on an elaboration of the Board's contract bar rule, discussed more fully below. The Board cited the employer for refusal to bargain, rejected the contract bar defense, and ruled that the employer had committed an unfair labor practice. The Board now petitions for enforcement of its order directing the employer to bargain. We grant enforcement.

In more detail, the background of the dispute is as follows: Circle A & W Products Co. (Circle A & W) manufactures electrical equipment in Portland, Oregon.

Since 1962, it has engaged in a series of collective bargaining agreements with International Brotherhood of Electrical Workers Local 49 (Local 49), the most recent of which commenced on January 1, 1977, and was due to expire three years later. Following the filing of a union de-authorization petition, an election was held on March 30, 1977. A majority of employees voted to withdraw the authority of Local 49 to require union membership as a condition of employment. After this election, Local 49 continued to abide by the terms of the collective bargaining agreement. In the succeeding year, however, the union's efforts to reinstate the union security clause resulted in another election to decide the issue. Shortly before the election, Local 49 notified the employees of its intention to disclaim representation in the event the union security clause failed to gain

majority approval. Once again, the employees voted against compulsory union membership, and as a consequence, Local 49 formally disclaimed in writing its representational interest in Circle A & W's employees on April 28, 1978.

In an attempt to challenge the disclaimer, Circle A & W filed unfair labor practice charges against Local 49, alleging a failure and refusal to bargain collectively as well as the restraint and coercion of its employees in the exercise of their §7 rights in violation of §§8(b)(1)(A) and 8(b)(3) of the National Labor Relations Act (Act), as amended 29 U.S.C. §§158(b)(1)(A) and 158(b)(3) (1976). Two days later, the Regional Director dismissed these charges, and the subsequent appeal to the Office of Appeals was denied.

In the interim, Warehousemen's Union Local No. 206, International Brotherhood

of Teamster, Chauffeurs, Warehousemen and Helpers of America (Local 206) had filed a petition to represent those Circle A & W employees previously represented by Local 49. At the representation hearing held on May 17, 1978, Circle A & W contended that, because a valid collective bargaining agreement with Local 49 existed, Local 206's petition must be rejected, citing the Board's contract bar rule. East Mfg. Corp., 242 N.L.R.B. No. 5 (1979); Mack Truck, Inc., 209 N.L.R.B. 1003 (1974); Gate City Optical Co., 175 N.L.R.B. 1059 (1969); Aircraft Turbine Service, Inc., 173 N.L.R.B. 709 (1968). Relying on Local 49's disclaimer of interest in representing the unit, the Regional Director found no contract bar present and, accordingly, directed that an election be held.

Based on the rejection of its contract bar defense, along with some

procedural objections, Circle A & W requested a review of the Regional Director's decision, which the Board summarily denied on the ground that no substantial issues were raised. In the subsequent election, Local 206 was chosen to represent the unit and was promptly certified by the Board. Circle A & W then refused to commence collective bargaining with Local 206, resulting in an unfair labor practice charge filed by the union. The Regional Director this time issued a complaint. The Board, ruling on the general counsel's motion for summary judgment, found Circle A & W's actions violative of §§8(a)(5) and (1) of the Act. The Board's order directs the company to cease and desist from engaging in the unfair labor practice and requires it to bargain with Local 206.

[1] Circle A & W contends that under the Board's own precedents, employees are

permitted to designate a new bargaining agent contrary to the terms of an existing collective bargaining agreement only if representation by the original union is wholly impracticable, such as in cases where there is a union schism, Oregon Macaroni Co., 124 N.L.R.B. 1001, 1004 (1959); Hershey Chocolate Corp., 121 N.L.R.B. 901, 906-12 (1958), enf't denied on other grounds, 297 F.2d (3d Cir. 1961), or where the union is defunct, Bennett Stove Co., 139 N.L.R.B. 1422, 1423 (1962); Hershey Chocolate, supra. There is logic to that position, and we agree with the employer that the foregoing cases do not square precisely with the Board's subsequent decision in American Sunroof Corp. - West Coast, Inc., 243 N.L.R.B. No. 172 (1979). There, as in this case, due to a dispute over a union security clause, a new bargaining agent was selected and the Board required the employer to bargain,

thereby rejecting a defense based on the contract bar rule without explicitly recognizing the important policy to protect the employer by preserving stability of a collective bargaining agreement. We agree with the respondent employer that employees are not free to avoid a contract by electing a new bargaining representative for any reason at all.[1]

[2] The Board's contract bar rule is designed in recognition of the importance of preserving stability in collective bargaining agreements. East Mfg. Corp., 242 N.L.R.B. No. 5 (1979). Simply stated, the rule holds that an existing collective

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1. While somewhat opaque, the decision in American Sunroof may be justified on the ground that the Board explicitly found no collusion or attempt to avoid the terms of the collective bargaining agreement by the employees or the disclaiming union. 243 N.L.R.B. No. 172, at 5.

bargaining agreement not exceeding three years will bar a petition for redetermination of representation in most instances. Bob's Big Boy Family Restaurants v. NLRB, 625 F.2d 850 (9th Cir. 1980). The rule does not find its source in the express language of the statute, nor is it judicially compelled. Rather, the Board has formulated the rule and thus has the principal discretion to waive or apply it in order to effectuate its policy underpinning. Local 1545, United Brotherhood of Carpenters and Joiners v. Vincent, 286 F.2d 127, 130-31 (2d Cir. 1960) (Friendly, J.); Leedom v. Local 108, International Brotherhood of Electrical Workers, 278 F.2d 237, 241-43 (D.C. Cir. 1960). The Board discretion must not run counter to other policies of the Act, however, and we think certain guidelines are required in applying the rule.

[3] The policy of preserving

industrial stability is of sufficient importance that the Board is required to implement the contract bar rule to protect the employer's rights as well as those of the employees. Accordingly, neither a union nor its members may rely on a severance of their relations as a grounds for designating a new representative if a substantial motive underlying that rift is to avoid the terms of an existing collective bargaining agreement. It may be appropriate, if not required, moreover, for the Board to make an inference or presumption of a prohibited purpose to avoid the terms of a bargaining agreement if the reason for a union's disclaimer is insignificant, minor, or contrary to the policies of the Act. In such cases, the employer may not be required to recognize a new bargaining agent within the period to

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which the contract bar rule is applicable.[2]

On the other hand, the Board is also required to implement the policy of the Act to ensure that employees secure fair, adequate and effective representation by their designated collective bargaining agent. There will be circumstances, in addition to schism or union defunctness, in which a change in representation is necessary in order to implement that policy. Where the objectives of contract stability and adequate employee representation conflict, the Board must exercise its discretion to reach an appropriate balance, but it must give explicit

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2. A union might conceivably disclaim further representation of an employee unit for other improper purposes, and failure to apply the contract bar rule in such a situation could amount to an abuse of the Board's discretion. Such facts are not presently before the court and hence call for no ruling at this time.

recognition to both sides of this balance.

While the Board's adjudication of this dispute was not entirely satisfactory under these principles, we nevertheless rule that its order must be enforced. Circle A & W did not allege that the union disclaimer or the employees' petition for a new election was a pretext for avoiding the terms of the collective bargaining agreement. The employer did not allege collusion between the parties for this purpose. The employer, finally, did not allege that avoidance of the collective bargaining agreement was a significant motivation of either the union or the employees. To the contrary, it stated that the dispute over the union security clause was the sole reason for changing bargaining agents. The employees did not object that the union had violated their section 7 rights in making this demand, and we think it a fair inference that there was

a legitimate disagreement between the employees and their union on a fundamental matter of policy, rather than an attempt to avoid the terms of the contract with the company.

In these circumstances, Circle A & W was required to bargain with Local 206. The various procedural objections raised by the employer are without merit.

The petition is granted and the order is enforced.

PREGERSON, Circuit Judge (dissenting):

I respectfully dissent. I agree with the majority that the Board's adjudication of this dispute was not entirely satisfactory because the Board failed to articulate the basis for its conclusion that the contract-bar rule does not apply here. Unlike the majority, however, I would not draw the inferences necessary to support the Board's decision. Rather, I

would remand the matter to the Board for an explanation of the basis of its decision not to apply the contract-bar rule.

As the majority correctly points out, the Board's longstanding interpretation of the contract-bar rule does not square precisely with the Board's most recent contract-bar decision, American Sunroof Corp. - West Coast, Inc., 243 NLRB No. 172 (1979). Up until the American Sunroof decision, it appeared that a valid disclaimer of representational interest by a union was insufficient, standing alone, to suspend the contract-bar rule. Instead, under the formulation set forth in East Manufacturing Corp., 242 NLRB No. 5 (1979), a valid disclaimer merely prompted the Board to examine the policies underlying the rule. In deciding whether to impose a contract bar, the Board would strike a balance between the need to preserve industrial stability and the need

to protect the employees' right to a reasonable opportunity to change their bargaining representative. Balancing these important policy considerations was paramount in deciding whether to direct an election or to enforce the contract-bar rule.

In American Sunroof, however, the Board appeared to adopt, implicitly, a new interpretation of the contract-bar rule. In American Sunroof, without balancing the two competing policies, the Board suspended the contract-bar rule because of a valid disclaimer of interest by an incumbent union. Thus the current effectiveness of the contract-bar rule is questionable.

The majority opinion does not dispel this uncertainty. The majority succinctly states the policies relevant under pre-American Sunroof decisional law and endorses their consideration by the Board.

Yet the majority then appears to validate the suspension of the contract-bar rule on the sole ground that Local 49's disclaimer was valid. I am uncertain whether the majority is deciding that a valid disclaimer alone effectively suspends the contract-bar rule or whether the competing policies must still be considered. To avoid creating further confusion, I would grant the Board an opportunity to clarify its position. We have in the past recognized and deferred to the Board's expertise in these matters before rendering an opinion and I see no reason to depart from that policy now.

Generally we do not substitute our rationale for the rationale provided by the Board in its decisions. FTC v. Sperry & Hutchison Co., 405 U.S. 233, 249-50, 92 S.Ct. 898, 907-08, 31 L.Ed.2d 170 (1972); Bob's Big Boy Family Restaurants v. NLRB, 625 F.2d 850 (9th Cir.

1980). Because the Board did not explain its decision to suspend the contract-bar rule, I think it is appropriate to remand the matter to afford the Board an opportunity to explain the underlying rationale of its decision.

APPENDIX G

APPENDIX G

UNITED STATE COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
Petitioner,	)	
v.	)	No. 79-7534
CIRCLE A & W PRODUCTS COMPANY,	)	
Respondent.	)	

JUDGMENT

Before: KENNEDY, PREGERSON and POOLE, Circuit Judges.

THIS CAUSE came on to be heard upon the application for enforcement of an order of the National Labor Relations Board dated July 12, 1979, against Respondent, Circle A & W Products Company, Portland, Oregon, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on October 9, 1980, and has considered the briefs and transcript of record filed in

this cause. On June 8, 1981, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that:

Respondent, Circle A & W Products Company, Portland, Oregon, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Warehousemen's Union Local No. 206, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (hereinafter called the Union) as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees employed by Circle A & W Products Company at its Portland, Oregon, facility, but excluding office clerical employees, sales-persons, professional employees, independent contractors, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in section 7 of the National Labor Relations Act, (hereinafter called the Act.)

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Portland, Oregon, facility copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 19, (Seattle, Washington) of the National Labor Relations Board after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the aforesaid Regional Director in writing, within 20

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days from the date of this judgment, what steps have been taken to comply herewith.

Endorsed, Judgment Filed and Entered

/s/ Richard H. Deane
Richard H. Deane
Clerk

/Ā TRUE COPY,

ATTEST: Richard H. Deane
Clerk/

APPENDIX H

APPENDIX H

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. CIRCLE A & W PRODUCTS COMPANY, Respondent.	No. 79-7534 ORDER

Before: KENNEDY, PREGERSON, and POOLE, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing.

The full court has been advised of the suggestion for en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected. [Filed August 18, 1981]

APPENDIX I

APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	No. 79-7534
Petitioner,	)	
v.	)	NLRB No. 36-CA-3380
CIRCLE A & W PRODUCTS COMPANY,	)	
Respondent.	)	

ORDER ON MOTION FOR STAY OF MANDATE
(Rule 41(b) Fed.R.App.P.)

Upon due consideration of respondent motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before September 20, 1981.

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby granted.* [Filed September 1, 1981]

/s/ Kennedy
United States Circuit Judge
KENNEDY

*In the event that the motion for stay of mandate and the petition for writ of certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.

Opposition

Office - Supreme Court, U.S.
FILED
OCT 26 1981

No. 81-582

In the Supreme Court of the United States

OCTOBER TERM, 1981

CIRCLE A & W PRODUCTS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
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Assistant General Counsel

LINDA B. WEISEL
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National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the Board properly found that petitioner was not relieved of its obligation to bargain with the employees' chosen bargaining representative because of petitioner's collective bargaining agreement with another union that had previously disclaimed its status as collective bargaining representative.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 2

Statement 2

Argument 5

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Aircraft Turbine Service, Inc., 173 N.L.R.B. 709 7

American Sunroof Corp.-West Coast, Inc., 243 N.L.R.B. 1128 6

Bennett Stone Co., 139 N.L.R.B. 1422 ..... 6, 7

Dycus v. *NLRB*, 615 F. 2d 820 8

East Manufacturing Corp., 242 N.L.R.B. 5 8

Gate City Optical Co., 175 N.L.R.B. 1059 7

Hershey Chocolate Corp., 121 N.L.R.B. 901, enforcement denied on other grounds, 297 F. 2d 286 6

Local 1545, Carpenters v. *Vincent*, 286 F. 2d 127 ..... 3, 5

Mack Trucks, Inc., 209 N.L.R.B. 1003 7

Manitowoc Shipbuilding, Inc., 191 N.L.R.B. 786 ..... 6, 7

Page

Cases—Continued:

National By-Products Co., 122 N.L.R.B. 334 ..... 6, 7

NLRB v. *Burns International Security Services, Inc.*, 406 U.S. 272 3

News—Press Publishing Co., 145 N.L.R.B. 803 7

Oregon Macaroni Co., 124 N.L.R.B. 1001 6

Pacific Coast Association of Pulp & Paper Manufacturers, 121 N.L.R.B. 990 5

Plough, Inc., 203 N.L.R.B. 121 ..... 6, 7

Texlite, Inc., 119 N.L.R.B. 1792, enforced, 266 F. 2d 349 8

WTOP, Inc., 114 N.L.R.B. 1236 7

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 2

Section 8(a)(1), 29 U.S.C. 158(a)(1) 4
Section 8(a)(5), 29 U.S.C. 158(a)(5) 4
Section 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A) 4
Section 8(b)(3), 29 U.S.C. 158(b)(3) 4

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-582

CIRCLE A & W PRODUCTS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. F 1-17) is reported at 647 F. 2d 924. The Board's decision and order (Pet. App. E 1-23) is reported at 243 N.L.R.B. 434. The acting Regional Director's supplemental decision and certification of representative (Pet. App. C 1-8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1981 (Pet. App. G 1-5). A petition for rehearing was denied on August 18, 1981 (Pet. App. H). The petition for a writ of certiorari was filed on September 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at page 3 of the petition.

STATEMENT

From 1962 until 1978, the International Brotherhood of Electrical Workers, Local 49, AFL-CIO (hereafter "Local 49") represented a unit of petitioner's employees. The last collective bargaining agreement between petitioner and Local 49 was effective from January 1, 1977 until December 31, 1979 (Pet. App. A 3 n.2). Shortly after that contract was executed, petitioner's employees voted in a Board-conducted election to rescind Local 49's authority to maintain a union security clause in the contract (Tr. 17-18, 31-32).[1] During the following year, Local 49 requested on several occasions that the union security clause be reactivated as part of the contract (Tr. 22). In April 1978, pursuant to an agreement between petitioner and Local 49, the Oregon State Conciliation Division conducted an election on the issue of reactivation of the union security clause (PX 2; Tr. 13-14).[2] Prior to the election, Local 49 notified petitioner, the employees, and the Board that it would relinquish all rights and obligations as bargaining representative if the employees voted against reactivating the union security clause (PX 1; Tr. 15-16, 23-24, 26). The employees voted against reactivating the union security clause and Local 49 formally disclaimed in writing all its rights and obligations as representative of petitioner's employees (Pet. App. A 3 n.2; Tr. 14).

Shortly after Local 49 issued its disclaimer, Warehousemen's Union Local No. 206, International Brotherhood of

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[1] "Tr." refers to the transcript of the hearing before the regional office.

[2] "PX" refers to Local 206's exhibits in the hearing before the regional office.

Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereafter "Local 206") filed a petition for a representation election with the Board. Following a hearing, the Board's Regional Director issued a Decision and Direction of Election in which he found that the collective bargaining agreement between petitioner and Local 49 was not a bar to the election because Local 49 had formally disclaimed its rights and obligations as bargaining representative. The Director rejected petitioner's contention that a representation election was precluded by the Board's contract-bar rule. Under that rule, a collective bargaining agreement may bar raising a representation question during the term (not to exceed three years) of the agreement. See *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 290 n.12 (1972); *Local 1545, Carpenters* v. *Vincent*, 286 F. 2d 127, 130-131 (2d Cir. 1960). Petitioner contended that Local 49's disclaimer was insufficient to avoid application of the contract-bar rule because, under Board precedent, the bar could be waived only where there was a schism within the union or the union was defunct. The Director, in dismissing this argument, explained (Pet. App. A 3 n.2):

> Board precedent clearly establishes that for a contract to operate as a bar to a representation petition, the union signatory must demonstrate a present willingness and ability to represent employees and administer the terms of the contract. *J.P. Sand and Gravel Company*, 222 NLRB 83 (1976); *Hershey Chocolate Corporation*, 121 NLRB 901 (1958). Further, the Board has consistently found that a written disclaimer of interest such as the one herein constitutes sufficient evidence of a union's unwillingness to police the contract. *Plough, Inc.*, 203 NLRB 121 (1973); *Manitowoc Shipbuilding, Inc. and The Manitowac Company, Inc.*, 191 NLRB 786 (1971); *National By-Products Company*, 122 NLRB 334 (1958).

Petitioner's request for review of the Regional Director's decision was denied by the Board (Pet. App. B).[3] Following a Board-conducted election in which a majority of petitioner's employees voted for representation by Local 206, the Board certified Local 206 as the employees' bargaining representative (Pet. App. C 1-8). Petitioner refused to bargain with Local 206, and in subsequent unfair labor practice proceedings, the Board found that petitioner's refusal violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). A bargaining order was therefore issued (Pet. App. E 1-23).

The court of appeals enforced the Board's bargaining order (Pet. App. F 1-13). The court concluded that the Board's refusal to apply the contract-bar rule in the present circumstances was reasonable. The court noted that, in applying the contract-bar rule, the Board is required to consider that the rule promotes industrial stability. However, the court added (Pet. App. F 11):

> [T]he Board is also required to implement the policy of the Act to ensure that employees secure fair, adequate and effective representation by their designated collective bargaining agent. There will be circumstances, in addition to schism or union defunctness, in which a change in representation is necessary in order to implement that policy.

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[3]In May 1978, petitioner filed unfair labor practice charges against Local 49, alleging that the union's disclaimer violated Sections 8(b)(1)(A) and 8(b)(3) of the Act, 29 U.S.C. 158(b)(1)(A) and 158(b)(3). Following his investigation, the Regional Director dismissed these charges. Petitioner's administrative appeal of the Regional Director's dismissal was denied.

The court found such circumstances here, noting that (Pet. App. F 12-13):

> Circle A & W did not allege that the union disclaimer or the employees' petition for a new election was a pretext for avoiding the terms of the collective bargaining agreement. The employer did not allege collusion between the parties for this purpose. The employer, finally, did not allege that avoidance of the collective bargaining agreement was a significant motivation of either the union or the employees. To the contrary, it stated that the dispute over the union security clause was the sole reason for changing bargaining agents. The employees did not object that the union had violated their section 7 rights in making this demand, and we think it a fair inference that there was a legitimate disagreement between the employees and their union on a fundamental matter of policy, rather than an attempt to avoid the terms of the contract with the company.

ARGUMENT

Petitioner contends that the Board misapplied its contract-bar rule, asserting (Pet. i5-18) that the only recognized exceptions to its application are situations where a union is defunct or has undergone a schism. There is no merit to that contention.

The Board's contract-bar rule is not mandated by statute, but is rather an exercise of the Board's discretion based on policy considerations. See *Local 1545, Carpenters* v. *Vincent*, 286 F. 2d 127, 130-131 (2d Cir. 1960). The rule arises from the need to achieve a "balance between the oftentimes conflicting policy considerations of fostering stability in labor relations while assuring conditions conducive to the exercise of free choice by employees." *Pacific Coast Association of Pulp & Paper Manufacturers*, 121 N.L.R.B. 990, 991 (1958).

Since the purpose of the rule is to protect valid, existing bargaining relationships, the Board does not apply it where such relationships are lacking. Thus, the Board has refused to recognize a contract as a bar to an election where the bargaining representative is defunct or where there is a schism within the union. See *Hershey Chocolate Corp.*, 121 N.L.R.B. 901, 906-912 (1958), enforcement denied on other grounds, 297 F. 2d 286 (3d Cir. 1961); *Bennett Stone Co.*, 139 N.L.R.B. 1422, 1423 (1962) (defunctness); *Oregon Macaroni Co.*, 124 N.L.R.B. 1001, 1004 (1959) (schism).[4]

Similarly, where a union has properly disclaimed its representative status, there is no viable bargaining relationship to protect and therefore no reason to deny employees the right to vote for a union willing to represent them. Thus, in *American Sunroof Corp.-West Coast, Inc.*, 243 N.L.R.B. 1128, 1129 (1979), the Board stated:

> As we have held in the past, a contract does not bar an election when the contracting union has properly disclaimed interest in the employees covered by the contract.[3]

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[4] *Plough, Inc.*, 203 NLRB 121 (1973); *Manitowoc Shipbuilding, Inc. and The Manitowoc Company, Inc.*, 191 NLRB 786 (1971); *National By-Products Company*, 122 NLRB 334 (1958). See also *Amalgamated Meat Cutters and Butcher Workmen of North America, Local 158, AFL-CIO (Eastpoint Seafood Company, etc.)*, 208 NLRB 58 (1974).[5]

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[4] A schism exists where there is a split within the contracting labor organization over basic policy at the international level which results in a disruption of the established bargaining relationship. *Hershey Chocolate Corp., supra*, 121 N.L.R.B. at 906-909. A "defunct" union is one which is "unable or unwilling to represent the employees." *Id.* at 911.

[5] There is no merit to petitioner's suggestion (Pet. 20-21 n.4) that the Board's reliance on *National By-Products Co.*, 122 N.L.R.B. 334 (1958); Manitowoc Shipbuilding, Inc., 191 N.L.R.B. 786 (1971); and *Plough, Inc.*, 203 N.L.R.B. 121 (1973); is improper. Petitioner inaccurately infers that these cases stand for the proposition that a disclaimer

East Manufacturing Corp., 242 N.L.R.B. 5, 6-7 (1979) (Pet. 18-19), is distinguishable. There the union, which consisted only of the employees of the employer, drafted and executed a disclaimer of representation during the hearing on a rival union's election petition. The Board found that those "peculiar circumstances"(242 N.L.R.B. at 6) made the case more akin to *Mack Trucks, Inc.*, 209 N.L.R.B. 1003 (1974),[6] and *Gate City Optical Co.*, 175 N.L.R.B. 1059 (1969),[7] than to *National By-Products, Manitowoc,* and *Plough*—which are like the situation here.[8] *East Manufacturing Corp., supra,* 242 N.L.R.B. at 6-7.

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is proper only when a union is defunct because all three rely to some extent on *WTOP, Inc.*, 114 N.L.R.B. 1236 (1955), wherein the union was defunct. In *National By-Products, Manitowoc,* and *Plough,* there was no suggestion that the disclaiming unions were defunct and the Board plainly found that contracts with the disclaiming unions were not bars to representation elections.

[6]In *Mack Trucks,* the disclaimer resulted from a collusive agreement between the disclaiming union and the union seeking an election. The Board therefore held the contract-bar rule precluded the election.

[7]*Gate City Optical* did not involve a disclaimer, but rather a claim that the contracting union was defunct. The Board refused to order an election, however, concluding that the "defunct" union had merely transferred its affiliation from the contracting international union to the international union seeking the election. In those circumstances, no question concerning representation requiring an election existed.

[8]The Board also distinguished *Mack Trucks* and *Gate City Optical* in *American Sunroof, supra,* 243 N.L.R.B. at 1129.

News-Press Publishing Co., 145 N.L.R.B. 803 (1964), and *Aircraft Turbine Service, Inc.*, 173 N.L.R.B. 709 (1968), also cited by petitioner (Pet. 19), deal with the question whether the unions involved were defunct. In *News-Press,* the Board found that the union was still in existence and able to represent the employees, the record showing only that some of its members did not want it to continue serving as bargaining representative. In *Aircraft Turbine,* the Board found that a union was not defunct even though two members of the employee committee had left the Company's employ, and the remaining committeemen preferred to deal with the company as individuals rather than as union officials.

Petitioner's suggestion (Pet. 18) that the decision in this case allows a union to avoid a collective bargaining agreement simply because it does not like a term in the contract is wide of the mark. The Board permits a labor organization to disclaim representative status only if the disclaimer is unequivocal, made in good faith, and not for an improper purpose. See, *e.g., Texlite, Inc.*, 119 N.L.R.B. 1792, 1798-1799 (1958), enforced, 266 F. 2d 349 (5th Cir 1959) (no bona fide disclaimer where disclaimer not executed in good faith and union acted inconsistently with alleged disclaimer by restraining employees of employer from striking, continuing to receive welfare contributions from employer, and offering to sign a new contract if employer agreed to contract with enlarged scope). And see *Dycus* v. *NLRB*, 615 F. 2d 820, 826 (9th Cir. 1980). Here the union did not disclaim representation because it was dissatisfied with the collective bargaining agreement or for any other improper purpose. As the court of appeals correctly stated (Pet. App. F 12-13), "there was a legitimate disagreement between the employees and their union on a fundamental matter of policy, rather than an attempt to avoid the terms of the contract with the company." In such circumstances, it would not further the policies of the Act to force a continuation of the bargaining relationship.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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